

Review article

## **The foetal right to life**

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### **Abstract**

The case of *Vo v France* brought forward the controversial issue if the foetus is entitled to “everyone’s” right to life as described in Article 2 of the European Convention on Human Rights (ECHR). This issue consequently raises the question of when life begins, the legal status of the foetus and its connection with its mother’s rights. The European Court of Human Rights examined this issue many times but has never adopted a clear position on the matter, it rather avoids answering the question and is emphasizing more on allowing the Member States to decide according to their culture, religion, social and economic factors on this issue.

**Key words:** law, right to life, foetus

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## **Article 2 of the European Convention on Human Rights**

### **General remarks**

#### *Article 2 Right to Life*

*"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*

*2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:*

*(a) in defence of any person from unlawful violence;*

*(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*

*(c) in action lawfully taken for the purpose of quelling a riot or insurrection."*

Article 2 of the European Convention on Human Rights refers first and foremost to the right to life. It is already clear from that position alone as the second article of the Convention that it is primarily and fundamentally classified amongst other rights, as it is characteristically stated (Douwe, 2006) that if a person is deprived of his right to life all other rights become obsolete. Article 2 protects every person's right to life. It is clear from this wording that life means human life excluding animals and legal persons from the protective scope of the Article without, however, specifying what life and its time limits are: when it starts and when it ends.

The Court stated in this judgment that it could not define a precise standard for the abovementioned limits, since there is no unanimous answer on behalf of science and religion on this thorny issue. It leaves the Member States scope to adjust these limits according to their cultural, religious,

social and economic circumstances that characterize each and every one. The Court considers that it is preferable for each Member State to retain its autonomy in determining those limits without having any absolute commitment from the Court and will therefore have the power to judge each case independently, in a way that allows a flexible interpretation of the Convention which must be regarded as a living instrument adapting and transforming according to the different interpretations given to it in each case and not as a sterile legal document.

### **The right to life**

The right to life is linked to the starting point of human existence; it constitutes the natural, logical and legal prerequisite for the implementation of every human right. It is protected as a direct consequence of the personality rights of individuals and at the same time as a fundamental prerequisite for its application without equating or guaranteeing the right to a certain standard of living or the right to the free development of personality, even from the provision itself it appears that this is easier to define negatively.

In particular, the scope of the Article does not, primarily, concern the right to give a person life or to put an end to his or her life, but it recognizes the right not to be deprived of his or her life in the cases that Article 2 mentions. The State in this context is obliged not only to refrain from any behavior which may be a cause of death "intentionally" but also to take the necessary measures (preventive or repressive) to protect life, especially in the field of medical errors the Court held that the State's obligation to protect life under the provision of A 2 includes the obligation of hospitals to have regulations in order to protect patients' lives as well as to establish an effective judicial system for

determining the cause of death in the hospital and attributing responsibility to medical staff.

It is apparent, therefore, that the right to life is restricted to its significant declaration without the precise definition of neither its core nor its limits due to the fact that the Convention must retain its general and flexible nature, while allowing the Member States to define it on the basis of their own particular circumstances. The same general and flexible wording we notice at domestic constitutions with the current ones not specifying again the context of the right while the old ones do not even include a specific provision for this right (Katrougkalos, 1993). From this general wording can be concluded that the life of every human being is protected regardless of his or her age, state of health and abilities.

The protection of life, despite its obvious and undeniable importance, is not absolute; it retreats in view of the exceptional protection of other goods (i.e. during periods of war). In the provision of A 2 paragraph 2 are mentioned three exceptions where the death resulting from violence is not illegal, but it does not seem that these exceptions are limited to deliberate homicide. It describes situations in which violence is generally permitted as strictly necessary and can lead to deprivation of life.

Considering the abovementioned, when the *prima facie* absolute character of a fundamental right is becoming relevant, how can we assume that it will also include issues raised as controversial?

### **Who is included in Article 2**

All persons shall be entitled to the right to life: minors, foreigners, mentally and physically ill patients, those incapable of legal capacity (a general legal capacity is required as a liberal

constitutional order cannot exclude anyone from this fundamental right).

The main interpretative problem that arises in determining who is entitled to the right to life according to A 2 of the Convention is when the above national constitution and laws protection of A 2 begins and ends. When does human life begin and with it and the protection of its right? This question cannot be answered only in medical terms, as it is primarily a matter of social and ethical evaluation, it is determined on the basis of the prevailing perceptions in society as they are shaped by the political, religious, economic conditions for the assessment of the relevant principles and their prioritization.

As before, there is no unanimous answer today concerning the point from which the foetus is considered a person (Katrougkalos, 1993). In science it seems undeniable that the foetus is a distinct living organism from the moment of its implantation into the uterus, in particular the cells that make up the implanted embryo already contain the genetic codes that govern it and its subsequent natural development. However, this does not mean that the foetus enjoys the rights of the person to whom the State may have a derived responsibility for protection, nor that the embryo already incorporates an inherent value for which its protection is necessary. Its protection, as has already been mentioned, is not determined by objective biological data but more by ethical and social (Dworkin, 2013).

At this point, in order to highlight the hazards of the vague nature of the link between the protection of life and ethical and social criteria, it is necessary to refer to Singer's extreme views that only the "individuals" who are aware have the right to life, he even believed that the common homicide and the homicide of a neonate do not

have the same moral disapproval since the neonate has no awareness of its existence. Singer becomes even more provocative claiming that the fetus has no greater value than non-human life since it lacks certain properties required to be classified as a person (by week 18 its CNS has not been developed, so if the pregnant woman has an abortion by that time the existence of a thing that has no value per se ends). The position of Mr. Hoerster, who advocates the freedom of abortion, is similar, since he considers that the embryo has no desires and plans for the future, not even self-awareness.

### **The embryo's right to life**

The ECHR has not answered the question of whether or not the foetus is covered by the term "everyone" that A 2 uses. On the contrary, in the case of *Vo v France* all separate and dissenting opinions expressed, answered the question of applicability and there are strong arguments that the foetus, at least a viable one, is in fact covered by the term "everyone" within the meaning of Article 2. First, the Court may avoid answering this controversial subject but it has never completely excluded the foetus from the possibility of being included in A 2. Instead, the ECHR has repeatedly applied the "even assuming" formula which would not have been necessary if Article 2 had been considered to be entirely inapplicable. Moreover, they claim that there is no crucial difference between a foetus and a neonate, because both are similarly dependent upon their mother. The fact alone that the foetus does not have an independent existence from its mother does not lead to a different result and, as this case illustrates very well, separate protection is needed at least for the viable fetus and its mother. Finally, today the advancement of

technology brings forth serious legal and ethical issues concerning human life and the legal concept of its protection. Therefore, the increasing role of bioethics especially when it comes to medically assisted reproduction and subjects such as prenatal diagnosis, reproductive cloning makes it impossible for the Court not to set a primary course by defining basic questions. Consequently, the interpretation of Article 2 must evolve with these new developments, requiring now the inclusion of the right to life of the fetus (Pichon, 2006).

It is clear from what has already been mentioned that the Convention establishes the right to life as a general obligation to be fulfilled by the Member States which have ratified it. From this point on it is for them to define the specific framework by means of their national legislative procedures by specifying this right either in their constitution or in their laws.

The first issue that arises in the implementation of A 2 concerns the point in time from which life begins. Initially, the term "everyone" does not exclude the possibility that unborn life falls within the scope of the Article. There is no national and international agreement on this issue. In the context of the Greek legal system, the foetus is considered subject to law only after it is born alive, and it is not the subject of a right until then.

The legal order recognizes the existence of the foetus as a legal asset which requires legal protection and not as a right-holder, since if it was not the case the protection of the foetus would have to be made equal to the protection of the mother. In order to recognize the foetus as the holder of a constitutional right, it would not be decisive for it to involve in a person, the simple origin by human beings, as this view can

easily lead to misunderstandings and racist beliefs. The person is a right holder because of his participation and his determination from social relations, the foetus cannot be included in them and therefore is not protected as a right holder. However, through these social relations the life of the unborn child is protected as an object of right, since it is considered to be a property of the mother's body and incorporates her right to a family, self-determination, free development of personality.

We note that we do not refer to the foetus's life but to its existence as if it implied the prospect of existence evolving into life, as more complete. The person is the official, final, physical and effective cause and principle for the development and operation of the stages of human material and human mental status; they belong to the person because he causes them himself. Finally, the person is the social and logical individual who naturally claims personality for himself and who passes it to other people. In other words, personality implies not only the existence of a passive ability to gain consciousness and reason, but rather an active ability to cause itself the very existence and development of its individual capabilities, physical and mental (Barry, 1989, 11). Therefore, since the existence of the foetus is neither independent nor fulfills the above conditions, it is not susceptible to the actual protection of A 2 but is indirectly protected through its mother. It is a potential life which cannot be considered as equal to the lives of persons already born and engaged in society so the protection afforded to it is (indirectly) constitutional but not absolute. We talk of a potential life because the personality of the foetus, as an unborn person, is not immediately apparent, since life at such an early stage is not manifested by functions manifested in persons

already born. The functions performed by the embryo are natural and characteristic for persons moving towards full maturity.

Karabelas (Karabelas, 1987), on the contrary, states that the State must protect human life born and unborn, every human being regardless of age, mental status, etc., and the fetus by claiming that it has only the right to its life. The crucial thing here is "its" because this does not establish the right to life as such, but as a right to self-determination, since he continues to say that it does not belong to the property of another person or his mother. If this would be the case, it does not seem consistent with the modern view of the issue, since according to this view, pregnant women would no longer have the right to self-determination themselves, they be forced solely by the fact that they are pregnant to carry it out and would not be able to take decisions on their own bodies, whereas if they did act in a way that would ultimately be harmful to the foetus would they risk being punished? The fetus is certainly a particularly sensitive entity because of its lack of defense capability in the event of an attack on its existence, but that does not mean that its protection should go to the other end, that of its equation with the rights of the mother. Only the American Convention on Human Rights explicitly refers to the foetus in relation to the right to life, as a basic right from which various rights originate, in Article 4 paragraph 1: "Every person has the right to respect his or her life. The right must be protected by law and generally, from the moment of conception. No one should arbitrarily be deprived of their lives". While it is indirectly protected in Article 6 paragraph 5 of the International Covenant on Civil and Political Rights: "The death penalty cannot be imposed on a pregnant

woman." highlighting at this point that the foetus is clearly protected in this case through its mother's rights.

The Court refrains from answering the above question showing two levels of approach: firstly, it refuses to answer whether the foetus is entitled to full protection under A 2 for the protection of the right to life and secondly it responded to the equally crucial issue of when human life begins: it states that the foetus's life is closely linked to its mother's and can be protected through it, meaning that the Court leaves no doubt that the fetus has a life in the context of evolving existence but does not respond in either direction as to whether it requires the full protection granted to "every person" under A 2 (Wicks, 2012 and Pichon, 2006).

### **The criterion of viability**

An issue which is constantly coming up in the study of whether the foetus has the protection of the right to life is that of its viability. There is no doubt that the fertilized egg of the 'next day' is also a right-holder as is the formed embryo of the later months of pregnancy. However, the fact that it is permitted to be destroyed by the next day's pill demonstrates precisely that limit, that before the embryo becomes viable in itself, it cannot be regarded as a subject of rights (Katrourgalos, 1993).

A comparison of the laws of the European States on abortion shows that there is broad agreement on the point between 22 and 28 weeks from which the interests of the foetus in terms of its existence become important but not necessarily sufficient to compare them with those of the pregnant woman (Plomer, 2005). This period also coincides with the scientific definition of the viability of the embryo. Today, with the advances in technology, neonates born in the 22nd week can be

supported and survive, the World Health Organization places the onset of the perinatal period at week 22 and neonates born within the above period are considered to have reached the viability threshold (in the past newborn infants born before week 28 used to be previable).

The interests of the embryo in life by recognizing the criterion of viability must under no circumstances be considered to prevail or even to bind the rights of the mother to the absolute protection of her life and health. It is accepted that the legal division of the foetus's right to life is gradually reduced to the last stages of embryo life in relation to embryo development at the start of pregnancy. Even the most liberal in their views such as Dworkin (Dworkin, 2013) who denies the legal and moral obligation to protect the life of the fetus in early pregnancy, agree nevertheless on the fact that as long as the foetus acquires the ability for autonomous existence it is gradually entitled to proportionate legal and moral protection. In fact, by analyzing the conclusions of specialized doctors on the point in time from which the fetus feels pain (30 weeks when the development of the cortex of the brain has the appropriate nerve substrate for the sensation of pain), Dworkin concludes that it is undeniable that the fetus does not have the necessary nerve substrate for interests of any kind up to a relatively late stage of pregnancy.

But why is the criterion of the viability of the embryo important? Firstly, because at the time of the embryo's viability, as defined above and not earlier, its brain has developed sufficiently that a basic ability to feel it is now available so it can be argued that the fetus has its own interests to exist, but this does not mean that from this point on it is recognized as a person with a corresponding obligation

to protect it by the State. Secondly, because before the point of the embryo's viability, pregnant women have a broad margin to decide whether to continue or discontinue their pregnancy, this has to do with the awareness and judgment of the pregnant woman as to her condition (a very small percentage of 0.01% of abortion takes place in the third quarter), when the fetus's physical development has progressed to such an extent that any extension of the abortion period appears to be it resolves the innate value of human life.

### **Conclusion**

Issues relating to the time limits of life are particularly sensitive as they include factors other than scientific-medical and legal ones. They concern the whole of society and they relate to issues which man, because of their intensity and nature, deals with primarily with emotion and not with reason and rules. Religion and society are the main referral points, as no legislation has been adopted, even when it was scientifically justified, if society was not prepared to accept and implement it. The Court correctly recognizes the Member States' discretion to regulate these matters according to their specific circumstances without making a decision which ignores the specific features of each State, but it must, in view of the same nature and increasing importance of these issues relating to the extremes of life, take a stand and give a direction to the Member States so that there is a solid basis on which they can regulate their legislation.

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The full text of the case of Vo v France  
(Application no. 53924/00) is available  
at:  
<file:///E:/2020/%CE%95%CE%A1%CE%93%CE%91%CE%A3%CE%99%CE%91%202/CASE%20OF%20VO%20v.%20FRANCE%20full%20text.pdf>